

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL J. BRODHEIM,

Plaintiff,

No. CIV S-02-0573 FCD EFB P

vs.

MICHAEL CRY, et al.,

Defendants.

ORDER

Plaintiff is a prisoner without counsel suing under 42 U.S.C. § 1983. Before the court are plaintiff's motion filed August 4, 2006 seeking a complete set of copies of documents that defendants filed with the court, a motion plaintiff entitles "motion to compel." Also before the court are plaintiff's motions for sanctions filed July 6, 2006, and September 13, 2006.

In his "motion to compel," plaintiff claims that defendants, on three occasions, provided plaintiff with incomplete copies of documents that defendants have filed with the court. This allegedly includes defendants' motion for summary judgment in which defendants neglected to include all of the pages to their Exhibit F. It also includes defendants' notice of correction filed four days later, and defendants' amended Exhibit F filed two days thereafter, each purporting to include the missing forms. Plaintiff claims that despite defendants' efforts to correct and amend their filings, he was still without Attachments A and B to Exhibit F. Defendants have filed

1 nothing in opposition to plaintiff's motion. Accordingly, good cause appearing, plaintiff's
2 motion is granted and defendants are hereby ordered to serve on plaintiff Attachments A and B
3 to Exhibit F within seven days from the service of this order.

4 On July 6, 2006, plaintiff filed a motion for sanctions pursuant to Rule 37(c)(1) of the
5 Federal Rules of Civil Procedure, seeking a court order prohibiting defendants "from using as
6 evidence in this case information which they have now disclosed in their motion for summary
7 judgment but which they did not provide to plaintiff as required by Rule 26(e)(2)." Rule
8 37(c)(1) provides in relevant part, "[a] party that without substantial justification fails to disclose
9 information required by ... Rule 26(e)(2), is not, *unless such failure is harmless*, permitted to use
10 as evidence at a trial, at a hearing, or on a motion any ... information not so disclosed" [emphasis
11 added]. Plaintiff states that defendants ultimately provided him with the information upon filing
12 their motion for summary judgment. That plaintiff was ultimately provided with the discovery
13 he seeks and can show no prejudice flowing from the delay in its delivery is the very essence of
14 a *harmless failure* to comply with Rule 26(e)(2). Plaintiff's motion is without merit and is
15 therefore denied.

16 On August 22, 2006, plaintiff filed another motion for sanctions for the alleged
17 intimidation of plaintiff's witness, together with a request for an evidentiary hearing in order to
18 determine the extent of the alleged violation. On September 13, 2006, plaintiff filed an amended
19 motion for sanctions, superseding the previous motion, yet containing the same allegations.
20 Plaintiff contends in his motion that, on August 10, 2006, his witness, Aaron P. Martin, a fellow
21 inmate, informed him that B.C. Williams, the Litigation Coordinator for the California Medical
22 Facility where plaintiff is housed, sought to verify the witness' signature. Mr. Martin did as
23 requested. The following day, B.C. Williams visited Mr. Martin's work site and put him on the
24 telephone with defense counsel in this matter. Defense counsel questioned Mr. Martin regarding
25 his signature verification and asked him to sign another document attesting to the authenticity of
26 the signature in question. Mr. Martin complied. Defense counsel then questioned Mr. Martin

1 about the contents of his declaration. Mr. Martin later informed plaintiff that he felt intimidated
2 by defense counsel and that he had no choice but to respond to her questioning. Plaintiff claims
3 that the actions undertaken by defense counsel in this controversy were improper and unethical.

4 Nothing in the Federal Rules of Civil Procedure precludes the questioning of witnesses
5 by opposing counsel at any time prior to trial. To the extent that plaintiff claims defense counsel
6 intimidated his witness, he has failed to demonstrate that any intimidation occurred beyond the
7 ordinary uneasiness one may feel in being questioned regarding one's statements. The witness
8 in question is neither a retained consultant or expert. Rather, he purports to be a percipient
9 witness over a matter in controversy. There is nothing inappropriate with defense counsel
10 interviewing, or having interviewed, a fact witness about the contents of his declaration or any
11 other matter material to issues anticipated for trial. Plaintiff's motion is without merit and
12 therefore denied.

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. Plaintiff's August 4, 2006, "motion to compel" is granted;

15 2. Defendants shall produce and serve on plaintiff the discovery requested in plaintiff's
16 motion to compel, or show cause why that they can not comply, within seven days of the date
17 this order is served;

18 3. Plaintiff's motion for sanctions filed July 6, 2006, is denied; and

19 4. Plaintiff's motions for sanctions filed on September 13, 2006, is denied.

20 Dated: March 27, 2007

21
22 
23 EDMUND F. BRENNAN
24 UNITED STATES MAGISTRATE JUDGE
25
26